U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 January 2003

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In the Matter of:

LARRY AUTON,
Claimant

Case No.: 2001-BLA-593

v.

CONSOLIDATION COAL COMPANY,
Employer

and

DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest
.....

Appearances:

Frederick K. Muth, Esq.
Hensley, Muth, Garton & Hayes
Bluefield, West Virginia
For the Claimant

Mary Rich Maloy, Esq.
Jackson & Kelly PLLC
Charleston, West Virginia
For the Employer

Karen Barefield, Esq.
Office of the Solicitor
Arlington, Virginia
For the Director, OWCP

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (the "Act"). The Act and implementing regulations, 20 CFR Parts 410, 718,

725 and 727 (the "Regulations"), provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and Regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2002). In this case, the Claimant, Larry G. Auton, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on January 30, 2002, in Bluefield, West Virginia. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18 (2002). At the hearing, Director's Exhibits ("DX") 1-44, Claimant's Exhibits ("CX") 1-2 and Employer's Exhibit ("EX") 1 were admitted into evidence without objection. Transcript ("Tr.") at 9, 11, 12. The record was held open after the hearing to allow the parties to submit post-hearing briefs. Briefs were submitted by the Claimant, the Employer and the Director.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing and the arguments of the parties.

PROCEDURAL HISTORY

This is the Claimant's first claim for benefits, filed on July 31, 2000. DX 1. The Claimant was initially found to be entitled to benefits by the Director of the Office of Workers' Compensation Programs (the "Director," "OWCP") in a Notice of Initial Finding dated November 30, 2000. DX 29. The Notice was sent to Nelson Coal Company, however, it was returned as "Attempted Not Known." DX 30. A second Notice was issued to Consolidation Coal Company on January 16, 2001, DX 31, which filed a timely controversion on January 19, 2001. DX 32. The Claimant was again found to be entitled to benefits; the Employer continued to contest liability; and this matter was referred to the Office of Administrative Law Judges for a formal hearing on March 19, 2001. DX 33, 34, 38.

ISSUES

The issues contested by the Employer are:

1. How long Larry G. Auton worked as a miner.

2. Whether he has pneumoconiosis as defined by the Act and the Regulations.

3. Whether his pneumoconiosis arose out of coal mine employment.

4. Whether he is totally disabled.

5. Whether his disability is due to pneumoconiosis.

6. The number of his dependents for purposes of augmentation.

7. Whether the named Employer is the Responsible Operator.

DX 38; Tr. 6-7.

APPLICABLE STANDARDS

This claim was filed after March 31, 1980. For this reason, the regulations at 20 CFR Part 718 apply. 20 CFR § 718.2 (2002). In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2002).

Parts 718 (standards for award of benefits) and 725 (procedures) of the Regulations have undergone extensive revisions effective January 19, 2001. 65 Fed. Reg. 79920 et seq. (2000). The Department of Labor has taken the position that as a general rule, the revisions to Part 718 should apply to pending cases because they do not announce new rules, but rather clarify or codify existing policy. *See* 65 Fed. Reg. at 79949-79950, 79955-79956 (2000). Changes in the standards for administration of clinical tests and examinations, however, would not apply to medical evidence developed before January 19, 2001. 20 CFR § 718.101(b) (2002). The new rules specifically provide that some revisions to Part 725 apply to pending cases, while others do not. For a list of the revised sections which do **not** apply to pending cases, see 20 CFR § 725.2(c) (2002). The U.S. District Court for the District of Columbia upheld the validity of the new Regulations in *National Mining Association v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). However, the Court of Appeals affirmed in part, reversed in part, and remanded the case. *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (Upholding most of the revised rules, finding some could be applied to pending cases, while others should be applied only prospectively, and holding that one rule empowering cost shifting from a claimant to an employer exceeded the authority of the Department of Labor). Accordingly, I will apply only the sections of the newly revised version of Parts 718 and 725 that the court did not find impermissibly retroactive. In this Decision and Order, the "old" rules applicable to this case will be cited to the 2000 edition of the Code of Federal Regulations; the "new" rules will be cited to the 2002 edition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

The Claimant, Larry G. Auton, testified that he began his coal mine employment in 1972

in West Virginia, for S & C Coal Company. Tr. 15, DX 2. His last coal mine employment was in West Virginia as well. Therefore this claim is governed by the law of the Fourth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

The Claimant was born on February 19, 1954, and has an eleventh grade education. Tr. 13, DX 1. The Claimant testified and I find that he has one dependent, namely his wife, Sheila, whom he married on November 15, 1972. Tr. 13, DX 7. The Claimant stated that he has been running short of breath since 1994. Tr. 23. He has been treated by Dr. Kirshnan for the past eighteen months. Tr. 24.

The Claimant has smoked cigarettes since the age of twenty years, having quit smoking four months before the hearing. Tr. 30.

Coal Mine Employment

The Claimant provided a work employment history form listing coal mine employment for S & C Coal Company (1972-1973), Burke Creek Coal Co. (1973-1975), Consol Coal (1977-1988), Nelson Coal (1982-1987), Muncy Coal Co. (1991), and Hard Hat Mining (1996). DX 2. On his application for benefits he listed "15 plus" years of coal mine employment. DX 1. At the hearing, Claimant testified that his first coal mine employment was for S&C Coal Company in 1972. Tr. 15. He testified that he worked there for almost four years, however, he also stated that he would agree with the statement that he worked there from 1972 to 1973. Tr. 15-16. The Claimant's testimony was then in accord with his employment history form, although he explained that he only worked at Hard Hat Mining for six months in 1996, and that he worked for approximately three months for Muncy Coal Company in 1991. Tr. 18, 20. He also testified that he worked for Kenny Childers in 1994, who owes him $12,000.00. Tr. 20-21, 26.

The Social Security Administration earnings record indicates that, in response to a request for employment history from 1978 to 1999, the Claimant worked from 1978 to 1984 for Consolidation Coal. DX 4. No employment is listed for the years 1985, 1986 or 1987. DX 4. In 1988 and 1989, the Claimant worked for Nelson Coal Company, while in 1989 and 1990 he worked for NEI Inc. In 1993, the Claimant worked for Bailey Energy, Inc. In 1996, he earned $5,712.75 from Hard Hat Mining, Inc. This appears to be his last coal mine employment. The Claimant's earnings from coal mine employment in 1983 were $4,645.88, while in 1984 they were $310.74.

The Director contends that the Claimant has eight years of coal mine employment. DX 5. In its post-hearing brief, the Employer does not assert any particular finding with regard to years of coal mine employment, while the Claimant alleges at least fifteen years of coal mine employment. Upon reviewing the evidence of record, I find that the earnings record from the Social Security Administration is the most reliable evidence of record with regard to employment from 1978 to 1999. I also credit the Claimant, however, with employment prior to that time, and based upon his testimony, credit him with an additional four years of coal mine employment from

1972 to 1977. Accordingly, I find that the Claimant was a coal miner, as that term is defined by the Act and regulations, for a period of twelve years.

Responsible Operator

It is the Director's position that the responsible operator in this case should be Consolidation Coal Company, for which the Claimant worked from 1978 to 1984. The Employer contends that if benefits are awarded, the Black Lung Disability Trust Fund should be held responsible. In support of its argument, Consolidation Coal Company argues that the Claimant was employed for over a full year by Nelson Coal Company, after he worked for Consolidation Coal Company, and that he also worked for NEI, Inc., which was known as Nelson Coal Company, between 1986 and 1990. Furthermore, it is Employer's position that the Claimant also worked for Bailey Energy, Inc. in 1993. The Claimant testified that NEI, Inc. was the same as Nelson Coal Company, Hard Hat Mining and Bailey Energy, Tr. 17-18, and that the same people owned the mines these companies operated. Employer argues that the Department of Labor failed to require the employers subsequent to it to be insured for federal black lung benefits, and it failed to fully investigate the names and corporate officers and the relationships between the various companies. Therefore, liability should fall to the Federal Black Lung Disability Trust Fund.

An administrative law judge is required to go back up the chain of operators for which the Claimant worked until the most recent operator which meets the regulatory requirements and has the financial ability to pay is identified. *See Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503 (4th Cir. 1995), *rev'g in part sub nom., Matney v. Trace Fork Coal Co.*, 17 BLR 1-145 (1993). It is the Director's burden, however, to investigate and assess liability against the proper operator. *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993). In *England*, the Benefits Review Board ("the Board") determined that the named employer "completely and successfully completed its defense that [another employer] should have been named as responsible operator by demonstrating that the claimant was employed by [the other operator] for more than one calendar year." Liability in that case was assessed against the Director because the Director never proceeded against the other employer, the Board further noting that it was not the named employer's burden to demonstrate the ability of the other operator to assume payment. The Director has a duty to notify all potentially responsible operators and to proceed against them by fully developing evidence regarding their financial capability pursuant to 20 CFR §§ 725.410 and 725.412. *See Mitchem v. Bailey Energy, Inc.*, 22 BLR 1-24 (1999)(*en banc*).

In the instant case, the record reveals that the notice of claim was originally sent to Bailey Energy, Inc., Nelson Coal Company and Consolidation Coal Co. DX 23, 27, 28. A Notice of Initial Finding was sent to Nelson Coal Company and to Consolidation Coal Company. DX 29, 31. The notices to Nelson Coal Company and Bailey Energy, Inc. were returned undeliverable. DX 24, 30. The Director dismissed Hard Hat Mining Co. as a potential responsible operator on the grounds that the Claimant did not work a full year for it. DX 19. Douglas Hatcher is listed as the secretary and treasurer of that company. DX 40. Nelson Coal Company was found to have

last operated in 1990, and to no longer be a viable corporation. DX 19. Records submitted by Director reveal that Nelson Coal Company was incorporated in 1987, is inactive and that its director was William D. Nelson. DX 40. The Claimant indicated in a note to the OWCP that Mr. Nelson was " in hiding from the FBI for tax and other things." DX 19. During his testimony, the Claimant testified that he had been told that Mr. Nelson was dead. Tr. 26. An affidavit from Vivian McCloud, a supervisory workers' compensation specialist in the Division of Coal Mine Workers' Compensation, indicates that she has researched Burke Creek Coal Company and Bailey Energy, Inc., neither of which were found to have been insured at the times in question. DX 44; *see also* DX 41, 42, and 43. Mr. Childers was the president of Bailey Energy, Inc. DX 41.

Upon reviewing the evidence of record, I find that the evidence supports the conclusion that Consolidation Coal Company was properly named the responsible operator herein. While the Claimant had other coal mine employers after his employment with Consolidation Coal Company, the Social Security Administration records, which I find to be the most reliable evidence, gives no indication that those latter companies were in any way related, as the Claimant suggested in his testimony. Indeed, the documentation submitted by the Director indicates otherwise. *See* DX 40, 41. I find that the Director has met his burden of establishing that these companies lacked insurance for the time in question, are not viable and cannot be held responsible. Consolidation Coal Company is the most recent employer for whom the Claimant worked for a period of at least one year in coal mine employment, and which is capable of assuming liability. Accordingly, it was properly designated the responsible operator pursuant to 20 CFR §§ 725.491, 492 and 493 (2000).

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations performed before January 19, 2001, are found at 20 CFR § 718.102 (2000) and Appendix A of Part 718. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b)(2000).

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the List of A and B-Readers issued by the National Institute of Occupational

Safety and Health (NIOSH).[1] If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A-reader; B= NIOSH certified B-reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

The following table summarizes the x-ray findings available in this case.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Ambiguous as to the Presence of Pneumoconiosis
11/29/94			DX 14, 15 Rahman
10/10/00	DX 11, 13, 15 Patel B BCR r/r ½, B DX 12, 13 Gaziano B r/r 3/2, B CX 2 Castle B r/r 2/2, B		
3/19/01	CX 2 Castle B r/r 2/2, B		

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies performed before January 19, 2001, are found at 20 CFR § 718.103 and

[1]NIOSH (the National Institute of Occupational Safety and Health) is the federal government agency which certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as A-readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as B-readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination.

Appendix B. The following chart summarizes the results of the pulmonary function studies available in this case. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.203(b)(2)(i) (2002).

Ex. No. Date	Age Height	FEV_1	FVC	FEV_1/ FVC	MVV	Qualify?
EX 1 9/11/87	33 66"	4.39	5.06		204	No
DX 14,15 EX 1 10/20/92	38 68"[2]	4.24	4.85	87.29		No
DX 14,15 EX 1 10/28/97	43 68"	3.91	4.52	86.53		No
DX 14,15 EX 1 10/21/98	44 68"	3.79	4.55	83.34		No
DX 15 7/21/99	45 68"	3.62	4.38		148	No
DX 8, 13 10/10/00	46 66"	3.32	4.04		143	No

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide

[2]The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance of 2" in the recorded height of the miner, I have taken the average height (67.33) in determining whether the studies qualify to show disability under the regulations. None of the tests are qualifying to show disability, whether considering the average height or the heights listed by the physicians who administered the testing.

(CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies performed before January 19, 2001, are found at 20 CFR § 718.105 (2000). The following chart summarizes the arterial blood gas studies available in this case. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 CFR § 718.105(b) (2000).

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?
DX 10, 13	10/10/00	Rasmussen	73 66	40 35	No No
CX 2	3/19/01	Castle	63.8	39.6	No

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 CFR §§ 718.202(a)(4) (2002). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2002). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2002). With certain specified exceptions, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2002). Quality standards for reports of physical examinations performed before January 19, 2001, are found at 20 CFR § 718.104 (2000). The record contains the following medical opinions and treatment records relating to this case.

DX 14 and 15 contain medical records from Bluestone Health Association reflecting Auton's medical treatment between October 1992 and November 1999. Several pages of the

records are handwritten and only partly legible.

The Claimant was seen on October 20, 1992 by Dr. William Bird. He found the Claimant to be suffering from mild coal worker's pneumoconiosis, further noting that he was a smoker. DX 14.

A November 29, 1994 chest x-ray was read by Dr. Rahman as indicative of nodular interstitial infiltrate, predominantly apical. He indicated that tuberculosis must be excluded. Differential diagnoses included inorganic and organic inhalational diseases such as silicosis, coal worker's pneumoconiosis and extrinsic allergic alveolitis, fungal infection and sarcoidosis. DX 14, 15,16.

On December 7, 1994, the Claimant was seen with complaints of a worsening lung condition. The diagnosis was mild bronchitis, black lung and chronic low back pain due to disc problem. DX 15.

On October 28, 1997, the Claimant underwent a physical examination, a form being filled out by Dr. Farhana Asad. The notations are terse. It is indicated that the Claimant has "CWP: stable." A pulmonary function study was performed, revealing a normal spirometry. DX 14.

On October 21, 1998, Dr. J. Mitchem examined the Claimant. He recorded that the Claimant suffered from mild coal worker's pneumoconiosis, further noting that he had stopped smoking. DX 14.

On July 8, 1999, the Claimant was seen for a general physical. In a "Physician's Summary," completed by Dr. Sheth for the West Virginia Department of Human Services, the diagnoses included rheumatoid arthritis and pulmonary fibrosis. Dr. Sheth indicated that the Claimant had become severely disabled within a short span of the last few months, from rheumatoid arthritis. Dr. Sheth further noted that to make matters worse, the Claimant also had extensive fibrosis and nodules, which he found could be due to coal worker's pneumoconiosis or rheumatoid arthritis. DX 15.

The Claimant was seen by Dr. Sheth again on August 9, 1999, having just finished three weeks of Prednisone. Dr. Sheth remarked that his "x-ray changes were impressive, but fortunately pulmonary function tests show normal ventilation values. He also maintains good exercise tolerance." Dr. Sheth stated that he was uncertain how much of the pulmonary fibrosis was from coal worker's pneumoconiosis as opposed to rheumatoid arthritis, however, he believed that it was "more likely" the former only. DX 15.

On October 10, 2000, Dr. David Rasmussen examined the Claimant for the OWCP. Dr. Rasmussen recorded the Claimant's work, social and medical histories. He listed a cigarette smoking history beginning at the age of twenty years, at the rate of one pack per day, and continuing until July of 2000, the Claimant now smoking occasional cigarettes. Based upon his

examination, which included the review of a chest x-ray reading by Dr. Patel, pulmonary function testing and blood gas studies, Dr. Rasmussen found that the Claimant had x-ray changes consistent with complicated pneumoconiosis Category B, "or in fact Caplan's syndrome or rheumatoid pneumoconiosis." Dr. Rasmussen opined that while other considerations must be given, "it is medically reasonable to conclude that Mr. Auton has complicated pneumoconiosis Category B and/or Caplan's syndrome secondary to his occupational dust exposure and possibly related to his rheumatoid arthritis." Dr. Rasmussen concluded that the Claimant's coal mine dust exposure "must be considered a significant contributing factor to his impaired lung function." His diagnosis was chronic bronchitis due to coal mine dust exposure and cigarette smoking. It was Dr. Rasmussen's opinion that the Claimant did not retain the pulmonary capacity to perform his last regular coal mine job. The coal mine dust exposure was the greater risk factor since the Claimant exhibited impairment in gas exchange without ventilatory impairment. DX 8, 9, 10,13.

Dr. Rasmussen advised Dr. Sheth by letter dated October 24, 2000, that the Claimant had been evaluated at the request of the Department of Labor. Dr. Rasmussen stated that the chest x-ray done in conjunction with that examination revealed significant abnormalities, probably consistent with complicated pneumoconiosis, Category B, "however, other considerations including rheumatoid lung disease and granulomatous disease, etc., also exist." DX 15.

After reviewing all the medical records available to OWCP, Dr. Domenic Gaziano stated that he believed that the Claimant had Caplan's syndrome which is coal worker's pneumoconiosis and rheumatoid arthritis. Dr. Gaziano explained that the Claimant's coal worker's pneumoconiosis was more advanced due to co-existing with rheumatoid arthritis. In his opinion, the pneumoconiosis was due to 8 years in a particularly dusty job as a roof bolter or a continuous miner operator. DX 13.

Dr. James R. Castle examined the Claimant on March 19, 2001. Dr. Castle is board certified in internal medicine and pulmonary disease. Based upon his examination, which included the taking of histories, a chest x-ray, pulmonary function and blood gas testing, Dr. Castle opined that the Claimant had (1) evidence of coal worker's pneumoconiosis, complicated; (2) no respiratory impairment; (3) hypertension, poorly controlled; (4) current smoker; (5) history of rheumatoid arthritis; and (6) hemoptysis, by history, of uncertain etiology. Prior to rendering his opinion, Dr. Castle also had the opportunity to review other records, including the results of prior pulmonary function testing, chest x-ray readings and the report of Dr. Rasmussen. Dr. Castle, who is a B-reader, stated his opinion that there was evidence of pneumoconiosis present, and that the changes were consistent with complicated pneumoconiosis. Dr. Castle was unable to administer an exercise arterial blood gas study because of Auton's poorly controlled hypertension. Dr. Castle concluded that Auton would not be able to perform his usual coal mine employment because of hypoxemia he developed in Dr. Rasmussen's exercise arterial blood gas study. CX 2.

The Claimant was seen at Bluefield Regional Medical Center by Dr. Radha Krishnan on June 6, 2001. Dr. Krishnan indicated that the Claimant was admitted to the hospital on June 6, 2001, and discharged on June 11, 2001. The final diagnosis included (1) acute exacerbation of

chronic obstructive pulmonary disease and coal worker's pneumoconiosis; (2) history of hypertension and hypertensive cardiovascular disease; (3) history of chronic rheumatoid arthritis; (4) chronic respiratory failure; (5) oxygen dependence; and (6) severe hiatal hernia with reflux esophagitis. CX 1.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis.* "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2002).

20 CFR § 718.202(a) (2002), provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in §§ 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners who died on or before March 1,

1978), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no evidence that the Claimant has had a lung biopsy, and, of course, no autopsy has been performed. The presumptions found at Section 718.305 and 718.306 are not applicable herein. There is evidence, however, of complicated pneumoconiosis.

Pursuant to § 718.304(a) the existence of complicated pneumoconiosis may be established when diagnosed by a chest x-ray which yields one or more large opacities (greater than 1 centimeter) and would be classified in Category A, B, or C. X-ray evidence is not the exclusive means of establishing complicated pneumoconiosis under §718.304. Its existence may also be established under §718.304 (b) by biopsy or autopsy or under §718.304 (c), by an equivalent diagnostic result reached by other means. The Board has held that the Administrative Law Judge must first determine whether the relevant evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at each subsection before determining whether invocation of the irrebuttable presumption under §718.304 has been established. *Melnick v. Consolidated Coal Co.*, 16 B.L.R. 1-31, 1-33 (1991) (*en banc*). The United States Court of Appeals for the Fourth Circuit has held that ". . .even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) [biopsy or autopsy] or prong (c) [other means] then all the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Eastern Associated Coal Corp. V. Director, OWCP (Scarbro)*, 220 F. 3d 250, 256 (4th Cir. 2000).

In the instant case, every physician who read the x-ray evidence for the purpose of classifying pneumoconiosis, found complicated pneumoconiosis to be present. Thus, Drs. Patel, Castle, Gaziano and Rasmussen all found Category B opacities. All of these physicians are B-readers, Dr. Patel also being a board certified radiologist. While there are suggestions of other possible factors, Drs. Rasmussen and Castle specifically stated in their reports that the Claimant suffers from complicated pneumoconiosis. Dr. Gaziano does not specifically list complicated pneumoconiosis in his written report, however, he does state that he found a pneumoconiosis which is more advanced due to co-existing rheumatoid arthritis, and his x-ray reading finds complicated pneumoconiosis. His finding supports those of Drs. Castle and Rasmussen, who, after examining the Claimant, find complicated pneumoconiosis to be present.

When reviewing all the relevant evidence of record, as set forth in detail above, I find that the totality of that evidence establishes the existence of complicated pneumoconiosis. In so doing, I give the greatest weight to the x-ray readings and the medical opinions of Drs. Rasmussen and Castle both of whom opine, after their respective examinations of the Claimant, that he suffers from complicated pneumoconiosis. Based upon a preponderance of the evidence, I find that the irrebutable presumption of Section 718.304 has been triggered, and that Claimant is entitled to benefits under the Act.

Date of Entitlement

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month that the claim was filed. 20 CFR § 725.503(b) (2002). The evidence herein is unclear as to when the Claimant may have first been suffering from complicated pneumoconiosis. Although Dr. Sheth found him totally disabled in July 1999, he attributed the disability to rheumatoid arthritis, and observed that Auton still maintained good exercise tolerance. Auton filed his claim for benefits in July of 2000. Complicated pneumoconiosis, with size B opacities, was visible upon x-ray by October 2000. Blood gas studies taken at that time were normal at rest, but showed hypoxemia with exercise. I therefore find the Claimant entitled to benefits from the month in which he filed his claim.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

The Claimant has met his burden to establish that he suffers from pneumoconiosis and is totally disabled thereby by virtue of establishing that he suffers from complicated pneumoconiosis. He is therefore entitled to benefits under the Act.

ATTORNEY FEES

The Regulations address attorney's fees at 20 CFR §§ 725.362, 365 and 366 (2002). Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits filed by Larry G. Auton on July 31, 2000, is hereby GRANTED.

A

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 725.481 (2002), any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O.

Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Ave., NW, Washington, D.C. 20210.